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February 3, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: September 22, 2004

Case Number: TSO-0143

This Decision concerns the eligibility of xxxxxxxxxxxx (hereinafter "the individual") for continued access authorization. The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual's suspended access authorization should be restored. For the reasons detailed below, it is my decision that the individual's access authorization should not be restored.

I. BACKGROUND

In April 2004, the Manager of the Personnel Security Department, National Nuclear Security Administration (NNSA), Department of Energy (DOE) issued a Notification Letter to the individual, stating that the DOE was in possession of derogatory information that created a substantial doubt concerning his continued eligibility for access authorization. In the Notification Letter, the Manager also informed the individual that he was entitled to a hearing before a hearing officer in order to respond to the information contained in the Notification Letter. The individual requested a hearing in this matter and the NNSA forwarded this request to the Office of Hearings and Appeals. I was appointed to serve as the hearing officer. In accordance with 10 C.F.R. § 710.25(e) and (g), I convened a hearing in this matter (hearing).

The Notification Letter finds security concerns related to the individual's behavior under Criteria H and J. 10 C.F.R. § 710.8(h) and (j). The Notification Letter bases the security concerns on the DOE consulting psychiatrist's February 12, 2003 written evaluation of the individual (February 2003 psychiatric report). That report indicated that the individual meets "the criteria for Alcohol abuse in early full remission." February 2003 psychiatric report at 17. The report goes on to indicate that he partially meets the criteria for alcohol dependence:

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Acknowledging that alcohol abuse is a milder problem, in the individual's case, I have shown in the body of this report that he met partial criteria for alcohol dependence and is at high risk for developing the more serious disease. However, the good news is that he had no prior history of treatment and so far, he seemed to be progressing in his state of readiness for change.

February 2003 psychiatric report at 18. The report also discussed an appropriate rehabilitation program. The DOE consulting psychiatrist recommended that the individual successfully complete an outpatient rehabilitation program including aftercare, participate frequently in AA meetings and abstain from alcohol for 12 months. February 2003 psychiatric report at 20. She also discussed the individual's rehabilitation efforts.

. . . it seemed that the individual had just started being very open to abstinence messages, abstinence being the absolute requirement for alcohol dependence. He is also actively following his aftercare/maintenance program except for the recommendation that he obtain a sponsor. However, this maintenance had only been for five months by the time of the writing this report. His potential for relapse without sufficient time of sobriety in my opinion is still moderate at this point.

February 2003 psychiatrist report at 18.

In the pre-hearing submission the individual indicated that he was arrested for public intoxication in September 2002 and he agrees with the DOE consulting psychiatrist's diagnosis of alcohol abuse. During the hearing the individual provided testimony which he believes demonstrates he has been actively involved in his alcohol rehabilitation program and with one exception discussed below has been abstinent since September 2002.

At the hearing the individual testified on his own behalf, and he presented the testimony of his wife, father, pastor, AA sponsor, supervisor, a coworker, plant psychologist, EAP counselor, and an outpatient program counselor. The DOE presented the testimony of the DOE consulting psychiatrist. A summary of the testimony follows.

II TESTIMONY

1. The Individual

In his testimony the individual described the events surrounding his arrest for public intoxication in September 2002. Transcript of Hearing (Tr.) at 14. Prior to an airplane flight he sat in the airport parking garage and drank vodka. He remembers leaving his car, entering the airport and his belt buckle causing problems with the metal detector. The next thing he remembers is waking in the city jail after being arrested for public intoxication. Tr. at 15.

The individual testified that two days after the arrest he reported the incident to the DOE security office. After filing the report he recognized that he needed help in overcoming his alcohol problem

and went to the employee assistance office run by his employer (EAP). As a result of his discussions with professionals at the EAP office he received three forms of alcohol rehabilitation treatment during the last three months of 2002. First, he received weekly alcohol counseling from the EAP counselor. Tr. at 20 and 38. Second, in October 2002 he enrolled in an outpatient alcohol treatment program run by a local hospital. The program consisted of six weeks of intensive private counseling and group meetings. Finally, the individual attended one AA meeting per week. Tr. at 22.

The individual testified that during October 2003 he had a one time relapse. Tr. at 22. On that occasion he was driving to join his father at a hunting camp. Tr. at 23. During the trip he purchased vodka and stopped by the side of the road and drank a portion of the vodka. Tr. at 23. On the following day his father told the individual that when the individual arrived at the hunting camp it appeared that he had been consuming alcohol. He told the individual he was disappointed by the individual's decision to consume alcohol. Tr. at 25.

After this relapse the individual realized that his alcohol problem was more serious than he originally realized and that he had to work harder to assure that alcohol would not continue to be a problem in his life. Tr. at 39. In November 2003 he resumed weekly attendance at AA meeting. Tr. at 40 and 42. During AA meetings held before January 2004 he introduced himself to the AA group as having alcohol related problems. However, beginning with an AA meeting in January 2004 he changed his view and introduced himself as an alcoholic. The individual believes that this shift in his understanding of his alcohol problem was a very important step in his rehabilitation. He testified that with this admission he was at step one of the AA program (e.g. admitting he did not have any power over alcohol). Tr. at 45. In June 2004 he obtained an AA sponsor. Tr. at 41.

The individual testified that he intends to abstain from alcohol consumption for the rest of his life. Tr. at 26. He now realizes that he is unable to consume alcohol without adverse effects. The individual moved to a new residence five months before the hearing. He was asked about his participation in alcohol treatment since that relocation. He indicated that in the last five months he has attended weekly group meetings with a group located near his new residence and he continues to meet with the EAP counselor on a monthly basis. Tr. at 27.

The individual was asked when he disclosed his relapse to those involved in supporting his rehabilitation efforts. He testified that he did not discuss the relapse in AA meetings and he first discussed the relapse with his wife and EAP counselor about a week before the Hearing. Tr. at 49 and 137. Notwithstanding this failure, he testified he feels confident that if he were contemplating drinking or actually had another relapse he would openly discuss the problem with both his wife and the EAP counselor. Tr. at 49.

2. The Individual's Pastor

The individual's pastor testified that he has known the individual as a member of his congregation for three or four years. Tr. at 51. A few days after the individual's arrest in September 2002 the individual dropped by the church. He and the individual had a frank and open discussion of the

individual's alcohol problem. The pastor indicated that he believes that the individual will not consume alcohol in the future. Tr. at 56.

3. Outpatient Program Counselor

The outpatient program counselor testified that he met the individual during his participation in the hospital intensive outpatient program. The program consists of group meetings, private counseling and homework assignment designed to provide information and insights to help patients overcome alcoholism. Tr. at 60. The counselor testified that the individual attended four group sessions per week and he saw the individual during each of those sessions as well as during their private counseling sessions. Tr. at 60. Since the end of the program he has seen the individual at a number of group meetings. Tr. at 60. The counselor testified:

When I first met him he was committed to his recovery, and he shared in group, and he was forthright and honest, and he took this thing very seriously. And as I came to know him better, his commitment grew so strong that he was actually a great encouragement to me as a person, as well as a good friend.

Tr. at 62.

The outpatient counselor indicated that he was not aware that the individual had a relapse in October 2003. Tr. at 63.

4. The Individual's AA Sponsor

The individual's AA sponsor testified that he has met the individual at AA group meetings. He has known the individual for about 9 months. Tr. at 65. He testified that in the spring the individual became very active in the meetings and in June 2004 asked him to be his sponsor. As the individual's sponsor, he sees the individual on a weekly basis and often talks with him on the telephone. He summed up his testimony by indicating:

I've watched the individual progress to the point that his sobriety and recovery are probably paramount in his life. It's very important to him, so his commitment to that has been – it's paramount. I have seen his willingness to share and to help other people. I think that he's got the potential to do that and help other people in the recovery process. And I've just seen steady progress every since we started working together.

Tr. at 67.

5. The Individual's Supervisor

The individual's supervisor testified that the individual is an excellent worker. He testified that he sees the individual on a daily basis and that he has not seen any evidence that the individual has used alcohol since his arrest in September 2002. Tr. at 72 and 75. The supervisor indicated that the

individual and he have discussed his counseling and his attendance at AA Tr. at 74. The supervisor has noticed an improvement in the individual's punctuality and the individual seems happier since he has stopped consuming alcohol. Tr. at 74.

6. The Coworker

The coworker testified that he has known the individual for eight years. Tr. at 77. He has seen the individual socially and talks with him on the telephone once or twice a week. Tr. 78. He does not believe the individual has consumed alcohol since October 2003. Tr. at 80.

7. The Individual's Wife

The individual and his wife were married in February 2003. Tr. at 29. They were dating when the individual was arrested in September 2002 and she obtained his release from jail. Tr. at 29. She testified that prior to his arrest she was not concerned with his level of consumption of alcohol. After the individual's arrest, she testified that he was very remorseful and willingly joined the outpatient program, attended AA, and committed himself to sobriety. Tr. at 83. To demonstrate his commitment and the support of his family she described their wedding and a family gathering last Thanksgiving. During both occasions the individual consumed non alcohol beverages when others consumed alcohol. Tr. at 84.

She also testified that she has seen a significant change in the individual behavior. Prior to the arrest he was moody, inconsistent and impatient. She indicated that she believed she was competing with alcohol for the individual's attention. Tr. at 85. She testified that now he is consistent and reliable. Tr. at 86.

She testified that a week prior to the hearing the individual told her that he had consumed alcohol in October 2003. She indicated that she was surprised to learn of this incident. Tr. at 89. She believes the individual is disciplined and he has not consumed alcohol since October 2003. Tr. at 90.

8. The Plant Psychologist

The psychologist at the plant where the individual is employed testified that he interviewed the individual shortly after his September 2002 arrest for public intoxication. Tr. at 99. He testified that the individual knew that his actions were unacceptable. Tr. at 102. He further testified that the individual's attitude was good and he followed through with his AA commitment. Tr. at 103.

9. The Individual's father

The individual's father testified that during a family vacation in September 2001 the individual became intoxicated and that he wrote the individual a letter indicating that he was disappointed with his behavior. Tr. at 107. He testified that between the time he sent the letter and the individual's September 2002 arrest there were signs that indicated the individual was having problems with alcohol. Tr. at 108.

The father testified that during the last three months of 2002, after the individual's arrest, he joined a treatment program, attended AA and spoke in depth with his pastor. Tr. at 112. During that period of intensive counseling the father telephoned the individual two or three times a week to encourage him to continue his efforts at rehabilitation. Tr. at 112. His father testified that since attending the rehabilitation program the individual has been a different person in that he has been easier to get along with and he does not show "nervousness or get upset as easy as he used to." Tr. at 108.

The father discussed the October 2003 weekend hunting trip. Tr. at 113. He indicated that when the individual arrived at the camp on Saturday afternoon he could smell that he had been consuming alcohol. Before the individual left on Monday morning he told the individual that he believed he had consumed alcohol. Tr. at 114. The individual admitted that he had been drinking on the drive to the camp. He indicated to his father that it would never happen again. Tr. at 115.

The father also discussed an October 2004 weekend hunting trip. His two sons drove to the camp together. His other son consumed a beer during the trip but the individual did not consume any alcohol. Tr. at 115. He indicated he was very proud of the individual for not drinking on the drive to the camp or during the weekend.

The father testified that he is confident that the individual has not consumed alcohol since October 2003 and believes he would know if the individual consumes alcohol in the future. Tr. at 116.

10. The EAP Counselor

The EAP counselor testified that he started seeing the individual in October 2002 when he came to the EAP office. Because he believed the individual had a problem with alcohol, he referred him to the outpatient program discussed above. Tr. at 119. During the last three months of 2002 he saw the individual on a weekly basis. Tr. at 119. After the individual completed the outpatient program he saw the individual every other week. Tr. at 119. He testified that:

the individual finally got through that denial, and took a long hard look at the fact that he was an alcoholic. But he went through the stages of denial, a lot of anger, that bargaining phase of trying to figure out how he could not be that, and finally he accepted that. And I watched him work through the process in a very, very honest and realistic way.

Tr. at 121.

He testified that he agreed with the findings in the DOE consulting psychiatrist's report. Tr. at 122. He also testified that he learned about the individual's October 2003 slip a few days before the hearing. Tr. at 123. However, he testified that he has seen the individual make great progress in his rehabilitation program. He mentioned that he thought it was a strong positive that the individual has gotten an AA sponsor and is being much more serious about his recovery program. Tr. at 123. He summarized by stating that he has seen tremendous changes in the individual and he does not believe he will consume alcohol in the future. Tr. at 126.

11. The DOE Consulting Psychiatrist

The DOE consulting psychiatrist testified that she interviewed the individual in January 2003. In her February 12, 2003 report, in which she diagnosed the individual with alcohol abuse and indicated that he met two of the criteria for alcohol dependence, she found that he was at high risk of developing the more serious disease, alcohol dependence. However, after listening to all of the testimony, she revised her diagnosis.

Specifically, she stated that the clinical picture indicates more than alcohol abuse, and that the proper diagnosis is alcohol dependence. Tr. at 145. She described in some detail why and how the individual meets criteria 3, 4, and 7 of the substance dependence criteria set forth in The Diagnostic and Statistical Manual of the American Psychiatric Association, IVth edition TR (DSMIV TR). The consulting psychiatrist testified that based on new information provided at the hearing, she now believes that the individual satisfied criterion 3, which she did not find in her February 2003 report. She testified that in her report she found that the individual met Criterion 4 (unsuccessful efforts to cut down) and the information presented at the hearing such as the father's letter and the relapse supports that finding. Tr. at 152. She also testified that in her report Criterion 7 (substance use despite psychological problems) was met because the individual continued to consume alcohol despite the "psychological problem in the clinical sense." Tr. at 153. She indicated that the new information about the October 2003 relapse and the father's letter would strengthen her report's finding that the individual met criterion 7. Tr. at 153. She testified that information about the October 2003 relapse indicates the individual meets criterion 3 (substance taken in larger quantities than was intended). Tr. at 151. She further indicated that the testimony about the individual's mood swings, of which she was previously unaware, is supportive of the alcohol dependence diagnosis. Tr. at 144.

She also testified about the individual's rehabilitation efforts. She testified that seeing the EAP counselor and attending AA are appropriate treatments for the individual. Tr. at 147. However, she believes that the testimony indicates weakness in the individual's commitment to his rehabilitation program. Specifically, she points to the fact that the individual has only been honest with the EAP counselor and his wife about his relapse a few days before the hearing. She indicated that in order to be considered rehabilitated the individual needs to continue with AA meetings and counseling from the EAP counselor and demonstrate a two year period of abstinence. Tr. at 146.

III. REGULATORY STANDARD

In order to frame my analysis, I believe that it will be useful to discuss briefly the respective requirements imposed by 10 C.F.R. Part 710 upon the individual and the hearing officer. As discussed below, once a security concern has been raised, Part 710 clearly places upon the individual the responsibility to bring forth persuasive evidence concerning his eligibility for access authorization, and requires the hearing officer to base all findings relevant to his eligibility upon a convincing level of evidence. 10 C.F.R. §§ 710.21(b)(6), 710.27(b), (c), (d).

A. The Individual's Burden of Proof

It is important to bear in mind that a DOE administrative review proceeding under this Part is not a criminal matter, where the government would have the burden of proving the defendant guilty beyond a reasonable doubt. Once a security concern has been raised, the standard in this proceeding places the burden of proof on the individual. It is designed to protect national security interests. The hearing is "for the purpose of affording the individual an opportunity of supporting her eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a).

This is not an easy evidentiary burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring an access authorization. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of access authorizations indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of an access authorization). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. In addition to her own testimony, the individual in these cases is generally expected to bring forward witness testimony and/or other evidence which, taken together, is sufficient to persuade the hearing officer that restoring access authorization is clearly consistent with the national interest. *Personnel Security Hearing (Case No. VSO-0002)*, 24 DOE ¶ 82,752 (1995).

B. Basis for the Hearing Officer's Decision

In a personnel security case under Part 710, it is my role as the hearing officer to issue a decision as to whether granting an access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. §710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). I must examine the evidence in light of these requirements, and assess the credibility and demeanor of the witnesses who gave testimony at the hearing.

IV. ANALYSIS

As discussed below I have determined that the individual has not resolved the security concerns regarding alcohol use. The individual indicated at the hearing that he agreed with the diagnosis of alcohol abuse contained in the DOE consulting psychiatrist's report. However, in her testimony, the DOE consulting psychiatrist changed the diagnosis of alcohol abuse set forth in her written evaluation to a diagnosis of alcohol dependence. The change in diagnosis was based on the

testimony of family members that prior to October 2002 the individual had significant alcohol related mood swings, that his father had written to the individual raising concerns about the individual's alcohol use and the individual had a relapse about which he did not inform those involved in his rehabilitation efforts. The DOE consulting psychiatrist testimony was very persuasive that the new information indicated a more serious alcohol problem and that the individual meets the standard for a diagnosis of alcohol dependence.

Since the DOE consulting psychiatrist's report indicated the individual only partially met the criteria for a diagnosis of alcohol dependence, the individual was not prepared for the change in diagnosis from abuse to dependence.¹ The individual's expert witnesses had testified and been excused before the DOE psychiatrist testified that she was revising her diagnosis. Therefore, the record is silent on the position those witnesses would have taken on the revised diagnosis. However, as discussed above the DOE consulting psychiatrist was specific and cogent in her analysis of the DSMIV TR criteria for alcohol dependence, and therefore ultimately convincing. She spoke pointedly about why the individual met criteria 4 and 7 in her February 2003 report and why she believed, based on hearing testimony, that the individual also met criterion 3. Accordingly, even though the individual's own experts did not have a chance to comment on the revisions in the diagnosis, I am convinced by the consulting psychiatrist's revised view that the correct diagnosis for this individual is alcohol dependence. Therefore, I find that that the individual is properly diagnosed as alcohol dependent.

In a number of alcohol dependence cases, the OHA has followed the advice of a consulting psychiatrist and found that a minimum effective rehabilitation program for alcohol dependence is a treatment program that provides education and support combined with two years of demonstrated abstinence. The testimony of the DOE consulting psychiatrist indicates she believes that given the facts in this case those minimum standards would be sufficient to demonstrate that the individual is rehabilitated.

First, I will consider the evidence on the individual's period of abstinence. I found the testimony of his wife, friends, family and counselors indicating that he has not consumed alcohol since October 2003 to be convincing. A number of witnesses testified that he has not consumed alcohol since October 2003 and that they have observed a change in the individual's behavior which indicates that he has not consumed alcohol since October 2003. Furthermore, the individual's change in his description of his alcohol problem at AA meetings in January 2004 shortly after his relapse is a good indicator that he has also changed his behavior. This change in behavior is confirmed by his obtaining an AA sponsor in June 2004 and the fact that he is now regularly attending group meetings. Therefore, I am convinced that the evidence presented at the hearing demonstrates the individual has been abstinent since October 2003.

However, the individual believes that I should find that his period of abstinence, with one relapse, dates back to September 2002. He believes this October 2003 relapse should be considered a one time event and that I should use the longer period of abstinence in determining whether he has

¹ The individual's attorney is very knowledgeable about these proceedings and could have made written submission after the Hearing if he believed the DOE consulting psychiatrist's diagnosis and treatment recommendations were not accurate. Also this problem could have been completely avoided had the individual been more honest with the DOE psychiatrist.

demonstrated rehabilitation. I disagree. While relapse is certainly a normal part of the rehabilitation process, I agree with the DOE consulting psychiatrist that a two year period of total abstinence from October 2003 is necessary to demonstrate the type of rehabilitation that gives the DOE confidence that the individual will be abstinent in the future.

Furthermore, the testimony at the hearing did not convince me that there were not other relapses between September 2002 and October 2003. The testimony of his father and wife indicated that they did not believe he consumed alcohol with the exception of the October 2003 relapse since September 2002. However, for the earlier period both his wife and father were less involved in the individual's rehabilitation efforts and their testimony was less specific. Also the earlier period was prior to the individual's realization of why he was unable to consume alcohol. The individual has failed to convince me that he was abstinent during the September 2002 to October 2003 period. Therefore, I find that he individual has failed to demonstrate a two year period of abstinence.

Finally, I am concerned about the weaknesses in the individual's treatment program. Those weaknesses are demonstrated by his failure to immediately disclose his October 2003 relapse to his wife and EAP counselor and by the fact that he was unable before January 2004 to admit to his AA group that he was an alcoholic. The individual has not demonstrated at the time of the hearing that his treatment program has been effective.

Therefore, I agree with the DOE consulting psychiatrist's conclusion that the individual must continue with the counseling and AA meeting until he has been completely abstinent from alcohol for two years in order to demonstrate rehabilitation.

VI. CONCLUSION

I have concluded that the individual has not mitigated the DOE security concern under Criteria H and J of 10 C.F.R. § 710.8. In view of the record before me, I am not persuaded that restoring the individual's access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. Accordingly, I find that the individual's access authorization should not be restored.

The review procedures applicable to proceedings under Part 710 were revised effective September 11, 2001. 66 Fed. Reg. 47061 (September 11, 2001). Under the revised procedures, the review is performed by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Thomas L. Wieker
Hearing Officer
Office of Hearings and Appeals

Date: February 3, 2005